United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

77-4127

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ACHWAN HORNG,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

----------x

Docket No. 77-4127

B
P/S

BRIEF IN SUPPORT OF PETITION TO SET ASIDE ORDER OF DEPORTATION

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TABLE OF CONTENTS

	Pages
PRELIMINARY STATEMENT	1
FACTS	2
ISSUES	6
ARGUMENT	7
A. Review of Proceedings Below	7
1. Scope of Review	7
2. Right to Remand for a Hearing	8
3. Degree of Proof Required	8
4. Procedures on Review	9
B. The Law Applied to the Facts of This Case	9
1. Lack of Record of Deportation Hearing	9
2. Failure to Advise Immigrant of His Rights	10
a. Right to counsel	10
b. Right to appeal	10
3. Failure to Swear or Identify Interpreter	11
4. Failure to Take Testimony Under Oath	11
5. Failure to Forward Record on Appeal	12
6. Inadequacy of the Order to Show Cause	12
C. Denial of Due Process	12
1. Giving Petitioner 25 Hours Notice of the Deportation Hearing Violates the Due Process Clause of the Fifth Amendment	14
a. Petitioner received 25 hours notice	14
b. The 25 hours notice was not timely	15
(1) The notice was not timely	15
(2) Notice in English to a Chinese-speaking deportee is constitutionally defective	16
2. Failing to Preserve a Record from which a Reviewing Court could determine Constitutional, Statutory and Regulatory Violations is Violative of the Due Process of the Fifth Amendment and Entitled Petitioner to a Presumption of such Constitutional, Statutory and Regulatory Violations in Light of the Prejudicial Conduct of the Respondent	18

Table of Contents, continued

Pages

D. Denial of Statutory Rights 19

E. No Reasonable, Substantial and Probative Evidence 20

F. Violation of Administrative Rules and Regulations 21

G. Abuse of Discretion 22

1. Discretionary Acts are Reviewable 22

H. Immigration and Naturalization Service Unfairly Prejudiced Against Petitioner 24

1. Failure to Forward Record on Appeal Despite Duty to Do So 24
2. Attempt to Deport Petitioner Prior to Deportation Date 25
3. Failure to Provide a Record of Petitioner's Alleged Deportation Hearing Despite Duty to Do So 25
4. Due Process Requires a Fair Hearing Before an Impartial Tribunal 25

I. Petitioner Entitled to Remain In This Country 27

CONCLUSION 29

TABLE OF AUTHORITIES

Pages

Cases Cited:

Barthold v. INS, 517 F.2d 689 (1975) 18

Bridges v. Wixon, 326 U.S. 135 (1945) 21

Burquez v. INS, 513 F.2d 751 (10th Cir. 1975) 19

Carbonell v. INS, 460 F.2d 240 (2nd Cir. 1972) 19

Castaneda-Delgado v. Imm. and Natural. Serv., 525 F.2d 1295 (7th Cir. 1975) 21

Chavez-Raaya v. INS, 519 F.2d 397 (7th Cir. 1975) 17

Nai Cheng Chen v. INS, 537 F.2d 566 (1st Cir. 1976) 17

Chlomos v. INS, 516 F.2d 310 (3rd Cir. 1975) 13, 15, 20

Citizens to Preserve Overton Park, Inc. v. Volpe 401 U.S. 402 (1971) 8

Dentico v. I.N.S., 303 F.2d 137 (2d Cir. 1962) 24

Foti v. INS, 375 U.S. 217, 845 ct. 306, 11 L.Ed.2d 281 (1963) 23

Fuentes v. Shevin, 407 U.S. 67, 81 (1971) 15

Gagnon v. Scarpelli, 411 U.S. 778 (1972) 13, 16, 17, 21

Goldberg v. Kelly, 397 U.S. 254 (1970) 13, 15

Goss v. Lopez, 419 U.S. 565 (1974) 13

Griffin v. Illinois, 351 U.S. 12 (1951) 18, 19

Robert E. Hampton, Ch'm'n'. United States Civil Service Comm., et al. v. Mow Sun Wong, 426 U.S. 88 (1976) 12

Hetzer v. Immigration and Nat. Serv., 420 F.2d 357 (9th Cir. 1970) 8

Table of Authorities, continued — Pages

Hupart v. Bd. of Higher Ed. of City of New York, 420 F.Supp. 1087, 1107 (S.D.N.Y. 1976) 21

Lennon v. I.N.S., 527 F.2d 187, 193 (2d Cir. 1975) 22

Long Beach Federal Sav. and Loan Ass'n. v. Federal Home Loan Bank, 189 F.Supp. 589 (D.C. Cal. 1960), reversed on other grounds 295 F.2d 403 (9th Cir. 1961) 25

Mathews v. Diaz, 426 U.S. 67, 77 (1976) 12

Miranda v. Arizona, 384 U.S. 436 (1966) 17

Morrisey v. Brewer, 408 U.S. 471 (1972) 13, 17, 20, 21

National Labor Relations Board v. Phelps, 136 F.2d 562 (6th Cir. 1943) 25, 26

Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), cert. den. 423 U.S. 824 23

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1936) 25

Polites v. Sahli, 302 F.2d 449 (6th Cir. 1962) 24

Rehman v. Immigration and Naturalization Service, 544 F.2d 71, 74 n. 6 (2d Cir. 1976) 22

St. Joseph's Stock Yards Co. v. United States, 298 U.S. 38 (1936) 25

Tumey v. State of Ohio, 273 U.S. 510 (1927) 25

United States ex rel. Hintopolous v. Shaughnessy, 353 U.S. 72, 77 S.Ct. 618 L.Ed 2d 652 (1957) 23

U.S. v. McAllister, 395 F.2d 855 (3rd Cir. 1968) 23

Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) 13, 14, 17

Yin Fong Chung v. Immigration and Nat. Serv., 418 F.2d 460 (D.C. Cir. 1969) 19, 20

Table of Authorities, continued — Pages

Constitutional Provisions Cited:

Fifth Amendment to the United States Constitution 13, 14, 18

Fourteenth Amendment to the United States Constitution 18

Statutes Cited:

Public Law 89-554, Sec. 4(e), Sept. 6, 1966, 80 Stat. 623 . . . . 9, 23, 27

Public Law 89-554, Sec. 8, Sept. 6, 1966 9

Public Law 94-574, October 21, 1976 7

5 U.S.C. Sec. 702 7

5 U.S.C. Sec. 706 . . . . . 7, 8

5 U.S.C. Sec. 1031 to 1041 9

8 U.S.C. Sec. 1105a(a) 9

8 U.S.C. Sec. 1105a(a)(4) 9

8 U.S.C. Sec. 1252(b) 14

8 U.S.C. Sec. 1252(b)(2) 13, 18

28 U.S.C. Sec. 2341 et seq. 9

28 U.S.C. Sec. 2412 29

Administrative Regulations Cited:

8 C.F.R. 3.3(a) 11, 14, 24

8 C.F.R. 3.5 . . . . . 12, 14, 24

8 C.F.R. 242.01 13

8 C.F.R. 242.1 14

8 C.F.R. 242.1(b) 12, 14

8 C.F.R. 242.12 . . . . . 11, 14

Table of Authorities, continued — Pages

8 C.F.R. 242.13 14

8 C.F.R. 242.14 . . . . . .10, 14

8 C.F.R. 242.14(e) 10, 11, 25

8 C.F.R. 242.15 14

8 C.F.R. 242.16 10

8 C.F.R. 242.16(a) 10

8 C.F.R. 242.19 . . . . . .11, 14, 24

8 C.F.R. 242.19(c) 14

8 C.F.R. 242.21 11

8 C.F.R. 243.4 22

Congressional Record Cited:

123 Cong. Rec. S 13826 (President Carter)(August 4, 1977) 28

Federal Rules of Appellate Procedure Cited:

Rule 39 29

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I. PRELIMINARY STATEMENT

A.

This proceeding is brought on by petitioner, who asserts that he was deprived of his constitutional, statutory, and regulatory rights during proceedings allegedly held by the Immigration and Naturalization Service of the United States Department of Justice.

B.

Petitioner asserts that he is too ill to travel and that the Immigration and Naturalization Service is unfairly biased against him.

In addition, petitioner requests that costs be awarded to him.

II. FACTS

Mr. Achwan Horng, an alien unable to speak or understand the English language and in poor health, is a crewman who entered the United States on or about August 27, 1975, and was admitted to St. Joseph's Hospital Health Center on September 9, 1975. He was subsequently taken into custody and an Order to Show Cause was issued, in English, on February 25, 1976, ordering him to appear before an Immigration Judge on February 26, 1976, some twenty-five hours later, at 1:00 p.m. On February 25, 1976, a bond determination was made. Petitioner posted a $2,500 bond, the cashier's check for which was received by the cash clerk for the Immigration and Naturalization Service ("INS") on that date.

No verbatim record exists as the tape recording of the hearing was not made, subsequently lost, or destroyed.

A form entitled "Decision of the Immigration Judge" (Form I-39) was subsequently signed by Immigration Judge Alex Schonfeld. The date on the form was handwritten as "3/3/76". The order granted petitioner voluntary departure until June 3, 1976.

Petitioner retained counsel between March 3, 1976 and March 12, 1976, for the first time. Through his attorney, an appeal to the Board of Immigration Appeals was made on March 12, 1976. Said notice of appeal was filed with the Regional Commissioner pursuant to forms received from the INS, including the appeal fee, and said appeal was sent by certified mail, return receipt requested, and said receipt was received. Thereafter, a letter was received from the Regional Office of the INS indicating that the appeal fee had been changed to $50.00, and said $50.00 was sent, once again by certified mail, return receipt requested, and said receipt was received.

Subsequent to the filing of said appeal, the Immigration and Naturalization Service called the office of the attorney for the alien, David C. Buxbaum, who was informed by Mr. Paul Kraus of the Regional Office of the Immigration and Naturalization Service that the Regional Office of the INS would not accept the notice of appeal because the alien had waived his right to such appeal.

Mr. Kraus indicated that the Regional Office of the INS would direct the appeal to the Board of Immigration Appeals in Washington, D. C., but would not itself hear said appeal. Mr. Kraus indicated that the procedures for sending the appeal to the Board of Immigration Appeals in Washington, D. C. would be handled by the Regional Office of the INS. Mr. Kraus indicated also, several days later, while the attorney for the alien was present, that said procedures had been taken care of.

Subsequently, pursuant to the suggestions of the INS, and with the understanding that a stay would be granted, an application for stay of deportation was made on April 3, 1976, and it also was sent certified mail, return receipt requested, and said application was received on April 6, 1976. Thereafter, on April 7, 1976, despite previous assertions that a stay would be granted, a letter came, signed by Henry E. Wagner, Acting District Director, stating that the notice of appeal was being handled as a motion to reopen and that the filing of the notice of appeal was untimely. It also stated: "In the meanwhile, a stay of deportation has been denied and you will be further advised concerning arrangements for your departure."

Subsequent thereto, a form I-166 was received by the alien and his attorney indicating that the alien was to report for deportation on May 6, 1976.

The attorney for the alien called the INS and informed them that this was contrary to their understanding and was informed that certain superiors of the INS had determined that this was to be the way these matters were to proceed. The attorney for the alien also called the INS and pointed out that the deportation was not to be until June 3, 1976, but was informed that he was incorrect in this regard.

On April 29, 1976, petitioner filed a motion to reopen and an application for a stay of deportation. Said motion was denied by Immigration Judge Schonfeld by an order entered January 20, 1977.

On March 10, 1977, petitioner filed a notice of appeal to the Board of Immigration Appeals from the decision of January 20, 1977.

Petitioner filed another application for a stay of deportation on March 14, 1977, pending improvement in petitioner's health and a decision on his application for appeal which had been previously filed on March 10, 1977.

Dr. George C. Wang indicated, on March 14, 1977, that travel by the petitioner was contraindicated.

A stay was granted on March 16, 1977, pending further medical evaluation of the fitness of petitioner to travel. Petitioner was examined by a surgeon of the United States Public Health Service on March 31, 1977, and declared fit to travel, despite the fact that petitioner had been previously hospitalized and declared by competent medical advice to be too ill to travel on March 14, 1977.

On April 28, 1977, the Board of Immigration Appeals dismissed petitioner's appeal, although the record contains no transcript of the original hearing before the Immigration Judge. Thereafter, on May 16, 1977, a notice of deportation was issued.

Petitioner filed his petition for review on June 24, 1977, and his proposed issues and joint appendix on September 21, 1977.

The petitioner in this case has been seriously ill in the United States of America and has spent considerable time in the hospital. He is quite ill and the possibility of his getting decent treatment in Taiwan is remote. Furthermore, petitioner's own doctor, on September 29, 1977, indicated that travel was still contraindicated.

III. ISSUES

1. WHEN THERE IS NO RECORD OF A HEARING BEING HELD AND NO RECORD OF PETITIONER BEING ACCORDED HIS STATUTORY AND DUE PROCESS RIGHTS, SHOULD AN ORDER OF DEPORTATION, BASED UPON AN ALLEGED HEARING, BE SET ASIDE?

2. IN VIEW OF THE FACT THAT PETITIONER HAS BEEN HOSPITALIZED AND DETERMINED BY COMPETENT MEDICAL ADVICE TO BE TOO ILL TO TRAVEL, IS IT NOT AN ABUSE OF DISCRETION FOR THE DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE TO FIND PETITIONER DEPORTABLE?

3. ARE THE FACTS THAT THE IMMIGRATION AND NATURALIZATION SERVICE FAILED TO FORWARD WHATEVER RECORD EXISTED ON APPEAL TO THE BOARD OF IMMIGRATION APPEALS, ATTEMPTED TO DEPORT PETITIONER PRIOR TO THE DATE ORDERED FOR HIS VOLUNTARY DEPARTURE AND FAILED TO PROVIDE A RECORD OF PETITIONER'S ALLEGED DEPORTATION HEARING MANIFESTATIONS OF SUCH PREJUDICIAL CONDUCT AS TO RENDER ANY FURTHER ACTION OF THE IMMIGRATION AND NATURALIZATION SERVICE TANTAMOUNT TO DENYING PETITIONER DUE PROCESS OF LAW?

IV. ARGUMENT

A. Review of Proceedings Below

1. Scope of Review

The United States Code has been recently amended to permit the United States, or any agency of the United States Government, to be a named party in any action, and clearly states that: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to seek judicial review thereof." (5 U.S.C. § 702, as amended by Public Law 94-574, October 21, 1976.)

The scope of review is set forth in the Code, at 5 U.S.C. § 706, which states in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Thus, a reviewing court is bound to set aside agency action, findings, and conclusions found to be without observance of procedure required by law, contrary to constitutional right, power, privilege or immunity, arbitrary, capricious or an abuse of discretion.

In addition, agencies' decisions unwarranted by facts can be set aside to the extent that ". . .the facts are subject to trial de novo by the reviewing court."

2. Right to Remand for a Hearing

It has been suggested by the writers in the field that:

> In cases where the Immigration Service renders decisions based in whole or in part on matters outside the record or the administrative action is adjudicatory and the agency fact finding procedures are inadequate, it would seem proper to accord a de novo judicial hearing under 5 U.S.C. Sec. 706(2)(F) (1970).
>
> When the administrative record is incomplete or inaccurate, remand by the court to the Immigration Service is considered appropriate.[1]

3. Degree of Proof Required

The procedures by which review is sought in this case require that the Attorney General's finding of fact be supported ". . .by reasonable, substantial, and probative evidence on the record considered as a whole. . .", 8 U.S.C. § 1105 a(a)(4), and if not, they are not conclusive upon this Court, and consequently, they are not sustainable.

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(1) Jack Wasserman, Immigration Law Practice (Second Edition 1973, ALI-ABA), p. 296. See, also, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Hetzer v. Immigration and Nat. Serv., 420 F.2d 357 (9th Cir. 1970).

4. Procedures on Review

The United States Code provides that procedures on review shall be governed by Title 28 U.S.C. § 2341 et seq. 8 U.S.C. § 1105a(a).[2]

Relevant provisions of procedural aspects of review before the Court of Appeals are specified in the Code as follows:

> (c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--
>
> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
>
> the court may order the additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order. Added Pub.L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 623.

B. The Law Applied to the Facts of This Case

The facts of this case relevant to the petition requesting that the order of deportation be set aside are set out in paragraph II above. It is clear that the findings of fact of the Attorney General are not supported by "reasonable, substantial, and probative evidence on the record considered as a whole. . ." and are consequently not sustainable. 8 U.S.C. 1105a(a)4. It is also clear that petitioner was denied his due process and statutory rights, and as such the deportation should be set aside.

1. Lack of Record of Deportation Hearing

Clearly, this in and of itself is enough to have the order of deportation set aside. It is impossible for the Attorney General's findings of fact to

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(2) Although 8 U.S.C. § 1105a(a) provides that procedure shall be governed by sections 1031 to 1042 of title 5, this was repealed by Public Law 89-554, § 8, September 6, 1966.

be adequately supported by the record if no such record exists.

Moreover, 8 C.F.R. § 242.14 requires that: "Testimony shall be given under oath or affirmation and shall be recorded verbatim." 8 C.F.R. § 242.14(e) (emphasis supplied). In view of the fact that no record or transcript of the alleged deportation hearing exists, let alone a verbatim record, respondent has blatantly violated this regulation.

Furthermore, as will be demonstrated below, respondent's failure to make or provide such a record makes it impossible to ascertain whether respondent complied with other statutory directives or accorded petitioner his due process rights.

2. Failure to Advise Immigrant of His Rights

a. Right to counsel

8 C.F.R. § 242.16 requires that in addition to advising petitioner of his right to legal representation, the inquiry officer must: ". . .advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government. . . ." 8 C.F.R. § 242.16(a).

Petitioner was never advised of these rights and consequently, he was not represented by counsel at his alleged deportation hearing. The lack of any record of this alleged deportation hearing makes it impossible to determine whether respondent complied with its own regulations with regard to apprising petitioner of his aforesaid rights.

b. Right to appeal

The rules of the Immigration and Naturalization Service provide that an alien has a right to appeal to the Board of Immigration Appeals from the decision

rendered at a deportation hearing. 8 C.F.R. §§ 3.3(a), 242.21. Those rules also provide that the alien is to be advised of his right to appeal. 8 C.F.R. §§ 3.3(a), 242.19. Respondent asserts that petitioner waived his right to appeal, but petitioner denies ever having been apprised of this right. Without a record of the hearing respondent cannot show that it complied with the aforesaid regulations. The fact that petitioner was subsequently able to appeal, despite respondent's attempt to prevent it, does not ameliorate the initial violation by respondent of its own regulations.

3. Failure to Swear or Identify Interpreter

The Code of Federal Regulations requires that:

> Any person acting as interpreter in a hearing under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of this service, in which event no such oath shall be required. 8 C.F.R. § 242.12.

The lack of any transcript of the alleged deportation hearing makes it impossible to determine whether there was, in fact, a competent interpreter present (although petitioner clearly needed one) and if so, whether he was properly sworn as required by the aforesaid regulation.

4. Failure to Take Testimony Under Oath

The rules of evidence and procedure required by the Code of Federal Regulations provide that: "The Federal Rules of Civil Procedure shall be used as a guide to the extent practicable. . .", 8 C.F.R. § 242.14(e), and further goes on to provide that: "Testimony shall be given under oath or affirmation and shall be recorded verbatim." 8 C.F.R. § 242.14(e).

The failure of respondent to furnish a verbatim transcript of the testimony given at the alleged deportation hearing is not only a violation of its duty

to provide such a transcript (see paragraph IV.B.1, supra), but also makes it impossible to deduce whether the Federal Rules of Civil Procedure were used as a guide, or if the testimony (if any) was given by properly sworn witnesses.

5. Failure to Forward Record on Appeal

8 C.F.R. 3.5 provides that "[i]f an appeal is taken from a decision. . . the entire record of the proceeding shall be forwarded to the Board by the officer of the Service. . . ." (emphasis supplied)

Respondent, in blatant disregard of this regulation, refused to forward the record of petitioner's case.

6. Inadequacy of the Order to Show Cause

In addition, the order to show cause served on February 25, 1976 clearly violated the rules of the Immigration and Naturalization Service. The order to show cause of February 25, 1976 was returnable on February 26, 1976. It, therefore, violated 8 C.F.R. § 242.1(b) which provides:

> The order will call upon the respondent to appear before a special inquiry officer for a hearing at a time and place stated in the order, not less than seven days, after the service of such order. . . .

C. Denial of Due Process

It has been affirmed and reaffirmed by the United States Supreme Court that an alien, "even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection [cit. omitted] that protects every one of these persons [aliens] from deprivation of life, liberty, or property without due process of law. [cit. omitted]" Mathews v. Diaz, 426 U.S. 67, 77 (1976). See, Robert E. Hampton, Ch'm'n. United States Civil Service Comm., et al. v. Mow Sun Wong, 426 U.S. 88 (1976) [HELD: barring resident aliens from

employment in the federal competitive civil service violates the due process clause of the Fifth Amendment].

To date, the Supreme Court has not ruled on the panoply of Fifth Amendment Due Process requirements attendant in deportation hearings. But, see, Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966); Chlomos v. United States Department of Justice, INS, 516 F.2d 310, at 313 (3rd Cir. 1975).

The case law is replete, however, with the Supreme Court's evaluation of the constitutional requirements of closely analogous hearings where a "liberty" or "property interest" is at stake. See, Gagnon v. Scarpelli, 411 U.S. 778 (1972) [probation revocation hearing]; Morrisey v. Brewer, 408 U.S. 471 (1972) [parole revocation hearing]; Goss v. Lopez, 419 U.S. 565 (1974) [school suspension hearing]; Goldberg v. Kelly, 397 U.S. 254 (1970) [hearing for termination of welfare benefits].

In addition, in measuring the procedural protections constitutionally required more than mere guidance is found in the bevy of regulations promulgated by the INS pursuant to 8 U.S.C. 1252(b), see, 8 C.F.R. 242.01 et seq., to ensure fairness in conducting hearings in which "the immediate hardship of deportation" is visited upon persons who often have no command of the language in which the procedures are conducted, as in the instant case. Woodby v. INS, supra, at 277.

Nor are we without any guidance from the Supreme Court which has ruled that deportability must be established by "clear, unequivocal and convincing evidence," Woodby v. INS, supra, at 285, a requirement held necessitated by the harshness of the deportation result, although the Fifth Amendment is not specifically referenced in the opinion.

The specific procedures challenged here as having been constitutionally deprived or defective are:

(1) Failing to give effective, meaningful and timely notice of the deportation hearing. [8 C.F.R. 242.1(b) "Order to show cause and notice of hearing."]

(2) Failing to provide an interpreter so that petitioner could understand the proceedings. [8 C.F.R. 242.12, "Interpreter"]

(3) Failing to effectively communicate to petitioner that he had a right to counsel under 8 C.F.R. 242.10 at his own cost.

(4) Failing to provide counsel.

(5) Failing to maintain a record of the hearing for purposes of appeal. [8 U.S.C. 1252(b); 8 C.F.R. 242.15]

(6) Failing to prove by evidence "clear, unequivocal and convincing" that petitioner was deportable. [Woodby v. INS, supra; 8 C.F.R. 242.14, "Evidence"]

(7) Failing to inform petitioner that he had a right to appeal. [8 C.F.R. 3.3(a); 8 C.F.R. 242.19(c)]

(8) Failing to forward the Record on Appeal. [8 C.F.R. 3.5, "Forward of Record on Appeal"]

1. GIVING PETITIONER 25 HOURS NOTICE OF THE DEPORTATION HEARING VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

a. Petitioner received 25 hours notice

The petitioner was given 25 hours notice of the deportation hearing allegedly held on February 26, 1976. The Order to Show Cause [pp. 164-165, Appendix] is dated February 25, 1976, [typed lower left hand corner] and orders petitioner to appear at 1:00 p.m. February 26, 1977 [typed, 3d para., p. 164, Appendix]. The return of service [p. 165, Appendix] indicates that petitioner was served at 12:10 p.m. on February 25, 1976. [p. 165, Appendix].

The Decision of Acting Chairman, Louisa Wilson, failed to reference the time of the hearing and merely refers to an "order dated March 3, 1976."

The original Decision of the Immigration Judge referenced as an "order dated March 3, 1976", fails to reference the date of the hearing and is itself dated "3/3/76".

There is nothing in the record indicating that petitioner was ever given a second notice of a second hearing on March 3, 1976 or that he received a notice of a postponement of the hearing to such date or that any hearing took place at all, save the references by the Immigration Judge in his order which appear in printed form as part of the form that the petitioner made "admissions" and the previously referenced dates and times in the Order to Show Cause and Return of Service. The verbatim record of the hearing has been lost by negligence or design of the respondent.

b. The 25 hours notice was constitutionally defective.

(1) The notice was not timely.

The sufficiency of notice can be eviscerated by untimeliness. The Supreme Court stated in Fuentes v. Shevin, 407 U.S. 67, 81 (1971), "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."

It has been explicitly held by the Third Circuit that "reasonable notice" of a pending deportation hearing is a constitutional requisite. Chlomos, INS, supra, at 313.

In Goldberg v. Kelly, supra, at 268, the Court was "not prepared to say that the seven day notice. . .provided by New York City [was] constitutionally

defective, per se, although there may be cases where fairness would require that a longer time be given." The Court was then careful to note with respect to the right to oral hearing itself that the "lack of educational attainment" of many of the welfare respondents made it necessary that they be given an opportunity to present their cases orally rather than be limited to written submissions.

Similar observations were made by the Court in evaluating the "unskilled or uneducated probationer or parolee" in deciding the latters' right to counsel. Gagnon v. Scarpelli, supra, at 787.

These observations with respect to probationers, parolees and welfare respondents are pertinent to potential deportees who have a language barrier to hurtle making the need for time to locate an interpretation of the notice and seek timely legal advice all the more important in evaluating the constitutional requirements of proper notice.

Nor can it be ignored that the remaining ostensible rights attendant petitioner's appearance at the hearing such as the right to retain counsel are effectively destroyed by respondent's tactics and along with it petitioner's ability to make use of what notice he was afforded.

That the procedure was violative of regulations promulgated by the INS itself is only secondary to this constitutional defect of lack of simple "fair play."

(2) Notice in English to a Chinese-speaking deportee is constitutionally defective.

The constitutional sufficiency of the contents of the notice of the deportation hearing in the Order to Show Cause could not be doubted were it designed to notify an American attorney well-versed in Immigration Law and not a Chinese-speaking layman.

It needs no citation of authority to establish that the contents of the instant notice predictably failed in their purpose resulting in the appellate embroilment herein.

The point is dramatized, however, by reference to probation/parole revocation hearing cases, as they have been labeled "not criminal prosecutions", although recognized as having serious rights at stake. Compare, Woodby v. INS, supra, at 285, [". . .a deportation proceeding is not a criminal prosecution. . ."] and Gagnon v. Scarpelli, supra, at 781, [. . .revocation of parole is not a part of a criminal prosecution." Morrissey v. Brewer, 408 U.S. 471 (1972)]. See, also, Nai Cheng Chen v. INS, 537 F.2d 566 (1st Cir. 1976)[HELD: Miranda warnings not necessary prior to interrogation of alien]; Chavez-Raaya v. INS, 519 F.2d 397 (7th Cir. 1975) [HELD: Although Miranda warnings not required, statements elicited cannot be used in subsequent unrelated criminal prosecution.][3]

Needless to say, if an indictment served months before a criminal prosecution, or the "written notice of the claimed violations of [probation] or parole" (Gagnon v. Scarpelli, supra, at 786) were served in Chinese or a language not spoken by the defendant or probationer, basic notice requirements would obviously not be met. The present rights of the petitioner were in no less a sense violated than an American defendant's Bill of Particulars being answered in Chinese, or an American welfare respondent's notice of a hearing to terminate benefits being given in Chinese, or an American school suspension respondent's being given notice of his violation in some language foreign to him. To give lip service to

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(3) Both Nai Cheng Chen and Chavez-Raaya serve as apt illustrations of how close to a criminal prosecution the deportation hearing comes and how counsel for deportees have been litigating to obtain some of a criminal defendant's rights.

constitutional notice requirements by giving a Chinese layman notice in English only debases the very ideas enshrined in the due process clause of the Fifth Amendment, "the bedrock of the Bill of Rights".

2. FAILING TO PRESERVE A RECORD FROM WHICH A REVIEWING COURT COULD DETERMINE CONSTITUTIONAL, STATUTORY AND REGULATORY VIOLATIONS IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND ENTITLED PETITIONER TO A PRESUMPTION OF SUCH CONSTITUTIONAL, STATUTORY AND REGULATORY VIOLATIONS IN LIGHT OF THE PREJUDICIAL CONDUCT OF THE RESPONDENT.

The United States Code specifically mandates that "determination of deportability in any cases shall be made only upon a record," 8 U.S.C. 1252(b), the only procedural requirement not left to Regulation, although the regulation reiterates the statutory mandate.

In Griffin v. Illinois, 351 U.S. 12 (1951), the Supreme Court held that even where there is no constitutional right to appeal, Griffin v. Illinois, supra, at 18, once the right is granted it cannot be done "in a way that discriminates against some convicted defendants on account of their poverty" by depriving poor appellants of a record. The gravamen of the holding that such deprivation was violative of the Equal Protection Clause of the Fourteenth Amendment as invidious discrimination. Petitioner herein is prevented for no reason other than sheer neglect of statutory duty from presenting his case on the issues referenced.

Carefully splaying out the authority justifying raising those requirements to a constitutional level would be to argue a non-justiciable hypothetical case as the recording of the hearing has either by design or neglect failed to reach this Court.

Nor can waiver of any rights, be they regulatorily or constitutionally generated, be presumed from a silent record. Barthold v. INS, 517 F.2d 689 (1975);

Burquez v. INS, 513 F.2d 751 (10th Cir. 1975); Carbonell v. INS, 460 F.2d 240 (2nd Cir. 1972).

This Court stated that deprivation of counsel "might raise grave issues in the abstract, see, Haney, Deportation and the Right to Counsel, 11 Harv. Int'l L. J. 177 (1970), but on the present record it is without merit." Carbonell, supra, at 242.

This Court carefully reviewed the record of the hearing in Carbonell, at 242 n.5, and is precluded from such inquiry herein.

By failing to preserve a record and forcing the instant petitioner into abstraction to the point of non-justiciability, the "grave issues" must be joined if only on the gravity of the failure to provide this Court with a record to determine whether the aforereferenced issues are meritorious in the present case.

The petitioner has thus been irrationally and invidiously singled out, Griffin v. Illinois, supra, victimized by wholesale ignoring of statutory and regulatory procedural requirements, see, B, D, infra, and has splayed upon the record sufficient bad faith to entitle him to a spoliation inference that the aforereferenced rights were violated.

D. Denial of Statutory Rights

In a case remarkably similar to the case at bar, Yin Fong Chung v. Immigration & Nat. Serv., 418 F.2d 460, 465 (D.C. Cir. 1969), the Court, in vacating a deportation order, noted that "[t]he case is apparently one where the Service has failed to comply with its regulations. . . .We say 'apparently' because the record is not as clear as we would like. . . ."

In the Chung case, petitioner alleged, inter alia: (1) that his interpreter (provided by the INS) was inadequate, (2) that the order to show cause was defective in that it was returnable in less than seven days, and (3) that he was not represented by counsel at his deportation hearing. These same claims plus others are advanced by petitioner in the case at bar. Surely then a similar holding is compelled.

Moreover, while the record in the Chung case was merely unclear, in the instant case it is non-existent, which is another factor in favor of ruling in petitioner's favor.

The respondent should not be allowed to get away with these en banc violations of its own regulations, which are promulgated in order to safeguard an alien's rights. To permit the Immigration and Naturalization Service to abuse and disregard their own regulations as it did in this case gives the Immigration and Naturalization Service virtual carte blanche to trample on the rights of aliens, which is to encourage the very evil that the regulations are designed to prevent.

This cannot be countenanced by this Court and therefore the deportation order must be set aside.

E. No Reasonable, Substantial and Probative Evidence

In view of the fact that there is no record of the original deportation hearing, there is no way of knowing on what evidence the Immigration Judge based his decision. In light of Chlomos v. U. S. Dept. of Justice, Imm. & Nat. Service, supra, it is a denial of petitioner's due process rights to allow such a decision to stand.

The Supreme Court, in Morrissey v. Brewer, 408 U.S. 471, 489 (1971), held that in a parole revocation hearing, at a minimum, due process required

". . .a written statement by the fact finders as to the evidence relied on and reasons for revoking parole." See also, Gagnon v. Scarpelli, supra, at 786 (same minimum requirement for probation revocation).

These cases are analagous to the case at bar. Neither parole nor probation revocation are criminal prosecutions, but both involve serious consequences. Morrissey v. Brewer, supra; Gagnon v. Scarpelli, supra. Similarly, although

> ". . .deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a most serious one--cannot be doubted." Bridges v. Wixon, 326 U.S. 135 (1945).
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> "In addition to the serious consequences of deportation itself, there is also the possibility that criminal prosecutions for violation of the immigration laws may result under 8 U.S.C. § 1325 (1970)." Castaneda-Delgado v. Imm. and Natural. Serv., supra.

Therefore, the lack of a record in this case is fatal.

F. Violation of Administrative Rules and Regulations

It is respectfully submitted that the failure of the INS to follow its own administrative rules and regulations, which are mandated by statute to protect the rights of parties to deportation proceedings, violated petitioner's right to due process of law and requires the order of deportation to be vacated.

The rule was recently invoked in Hupart v. Bd. of Higher Ed. of City of New York, 420 F.Supp. 1087, 1107 (S.D.N.Y. 1976), wherein the Court (per Frankel, D. J.) stated:

> It is by now familiar law that an agency's violation of its own regulations may in and of itself constitute a violation of due process. See, e.g., Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); Sangamon Valley Television Corp. v. United States, 106 U.S. App.D.C. 30, 269 F.2d 221 (1959). "An

> agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969). Such deviations "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." Hammond v. Lenfest, 398 F.2d 705, 715 (2d Cir. 1968).
>
> The sweep of the doctrine is broad. Its applicability does not turn upon the formality of the embodiment of the pertinent policy. See, e.g., United States v. Heffner, supra, 420 F.2d at 812 (IRS instructions); Smith v. Resor, 406 F.2d 141, 143-44 n.2, 146 (2d Cir. 1969) (Army newsletter); Sangamon Valley Television Corp. v. United States, supra, 269 F.2d at 224-25 (usual FCC practice). Cf. Yellin v. United States, 374 U.S. 109, 116-17, 83 S.Ct. 1828, 10 L.Ed. 2d 778 (1963) (prior congressional behavior). This is so because the same "danger of inconsistent treatment also exists when an agency departs from an unpublished rule or informal practice." Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 636 (1974). See also, United States v. Heffner, supra, 420 F.2d at 812. It is also irrelevant that the policy may be "more generous than the Constitution requires." United States v. Heffner, supra. See also, Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed. 2d 1403 (1959).

There exists here no reason why this wise and just rule should not be applied. Petitioner was, at his hearing, deprived of almost, if not every, right granted by statute[4] or rule to persons in his position, and as a result he is currently subject to deportation.

G. Abuse of Discretion

1. Discretionary Acts are Reviewable.

8 C.F.R. 243.4 provides that ". . .the district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate." Deportation has been deferred in the past due to an

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(4) Such statutes are, of course, to be strictly construed against the INS. Rehman v. Immigration and Naturalization Service, 544 F.2d 71, 74 n.6 (2d Cir. 1976); Lennon v. I.N.S., 527 F.2d 187, 193 (2d Cir. 1975) (wherein the Court stated "It is settled doctrine that deportation statutes must be construed in favor of the alien.")

alien's poor health. Lowenstein, The Alien and the Immigration Law, p. 273. See, U.S. v. McAllister, 395 F.2d 852 (3rd Cir. 1968), where the court held that compassionate circumstances warranted further consideration of a stay.

Apart from considerations of "compassion", the medical facts of petitioner's poor health and the dangers attendant travel have been documented more than once by the physician most intimate with his case history.

The United States Court of Appeals for the Second Circuit has recently held ". . .it seems settled that we do have jurisdiction to review exercises of I.N.S. discretion to determine whether they are arbitrary or capricious. See, Foti v. I.N.S., 375 U.S. 217, 228-230, 84 S.Ct. 306, 11 L.Ed.2d 281 (1963); United States ex rel. Hintopolous v. Shaughnessy, 353 U.S. 72, 77, 77 S.Ct. 618, 1 L.Ed.2d 652 (1957)." Noel v. Chapman, 508 F.2d 1023, 1024 (2d Cir. 1975), cert. den. 423 U.S. 824.

That the action by respondent in the instant case was an abuse of discretion is clear. Petitioner's own doctor, who has been treating him for some time, indicated that travel was dangerous for petitioner. However, in total disregard of this opinion and based on an opinion from a doctor who saw petitioner only once, respondent denied petitioner's request for a stay. Moreover, on September 29, 1977, Dr. George C. Wang again indicated that any travel by the petitioner was still contraindicated.[5] Surely, then, this is the very type of arbitrary and capricious behavior that cannot be tolerated by this Court and which must be overturned.

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(5) Such evidence is admissible by virtue of Pub.L. 89-554 § 4(e), Sept. 6, 1966, 80 Stat. 623.

Dentico v. I.N.S., 303 F.2d 137 (2d Cir. 1962) and Polites v. Sahli, 302 F.2d 449 (6th Cir. 1967) are not controlling as in neither case did the courts set out the specific facts relied on by the Government or the deportee, but merely said that the record did not indicate any abuse of discretion. To say that the present case is distinguishable is to engage in gross understatement. Here, the petitioner has been hospitalized and his own doctor says travel is dangerous for him. Yet, despite these facts, respondent decided that petitioner was fit to travel. Clearly on this record an abuse of discretion is not only indicated, but, in fact, obvious.

H. Immigration and Naturalization Service Unfairly Prejudiced Against Petitioner

1. Failure to Forward Record on Appeal Despite Duty to Do So

The rules of the Immigration and Naturalization Service provide that an alien has a right to appeal to the Board of Immigration Appeals from the decision rendered at a deportation hearing. 8 C.F.R. §§ 3.3(a), 242.19. Furthermore, 8 C.F.R. 3.5 provides that the Immigration and Naturalization Service must forward the record to the Board of Immigration Appeals. As noted in the decision of April 28, 1977, of the Board of Immigration Appeals, it was wrong for the Immigration and Naturalization Service to refuse to forward the record on the ground that petitioner's appeal was untimely; that determination was for the Board of Immigration Appeals to make. Furthermore, as also noted in the aforesaid decision, it was also wrongful conduct by the Acting District Director to treat petitioner's counsel's request to appeal as a motion to reopen.

2. Attempt to Deport Petitioner Prior to Deportation Date

Respondent, well-knowing that the order of deportation clearly provided that petitioner had until June 3, 1976 to voluntarily depart from this country, nevertheless attempted to deport petitioner on May 6, 1976. This too was blatantly wrongful conduct on the part of the respondent.

3. Failure to Provide a Record of Petitioner's Alleged Deportation Hearing Despite Duty to Do So

8 C.F.R. 242.14(e) provides that: "Testimony shall be given under oath or affirmation and shall be recorded verbatim." (emphasis supplied). Respondent has blatantly violated this regulation by either failing to make a recording originally or by subsequently destroying it, if in fact one existed. In either case, respondent's act is clearly wrongful.

4. Due Process Requires a Fair Hearing Before an Impartial Tribunal

It is elementary that due process requires a fair hearing before an impartial tribunal. Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1936); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (Concurring opinion of Justice Brandeis 1936); Tumey v. State of Ohio, 273 U.S. 510 (1927).

Moreover, the requirements of an unbiased and disinterested tribunal apply more strictly to an administrative adjudication than to a judicial one. Long Beach Federal Sav. and Loan Ass'n. v. Federal Home Loan Bank, 189 F.Supp. 589 (D.C. Cal. 1960), reversed on other grounds 295 F.2d 403 (9th Cir. 1961). This principle is probably best stated in National Labor Relations Board v. Phelps, 136 F.2d 562 (5th Cir. 1943) at pages 563-564, where the Court stated:

> "A fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." (emphasis in original)

In view of the facts set out in paragraphs IV. B. 1, 2, and 3, supra, it is respectfully submitted that respondent was unfairly prejudiced against petitioner in that for some unexplained reason it was anxious for him to be sent out of this country. This prejudice most manifested itself in respondent's evaluation and determination regarding petitioner's health. Respondent, as explained previously (paragraph IV. G. 1, supra), ignored the opinion of petitioner's own doctor in deciding that petitioner was well enough to travel. This conduct is further proof of the fact that respondent had a vendetta against petitioner; that it wanted him deported.

Admittedly, there was some evidence to enable respondent to decide that petitioner was well enough to travel, but it was scanty evidence at best, and, as stated by the Court in Phelps:

> "Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand." (emphasis in original)

In summary, it is petitioner's contention that when taken together the only conclusion that may be drawn from the acts of respondent (i.e., not forwarding the record on appeal, treating an appeal as a motion to reopen, attempting to deport petitioner prior to the date set for his voluntary departure and either not making or destroying a record of the alleged deportation hearing) is that they clearly evidence the fact that respondent was unfairly prejudiced against petitioner and was trying to do whatever it could to prevent the true facts of petitioner's case from being examined.

That this finding is compelled is further reinforced by the fact that the requirements of impartiality apply with even more force in the administrative context than in the judiciary. National Labor Relations Board v. Phelps, supra, at 563. If there is any doubt at all, it should be resolved in petitioner's favor.

Consequently, respondent's denial of petitioner's request for a stay of deportation and respondent's misrepresenting to the Board of Immigration Appeals that petitioner was well enough to travel deprived petitioner of his due process right to a fair hearing before an impartial tribunal, and as such petitioner's stay should now be granted, thereby giving him the right to remain in this country until he is healthy enough to travel.

I. Petitioner Entitled to Remain in This Country

As previously demonstrated in paragraphs IV.G.1. hereinabove, petitioner is entitled to remain in the United States due to his poor health. That this is still so is proved by the September 29, 1977 opinion of petitioner's doctor previously referred to.[5]

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(5) Admissible by virtue of Pub.L. 89-554, § 4(e), September 6, 1966, 80 Stat. 623.

Moreover, President Carter has very recently (July 19, 1977) made legislative proposals concerning the Regulation of Undocumented Aliens in which he urges the creation of a new immigration category. This category would be called "temporary resident alien" and would apply to all undocumented aliens who have resided in the United States continuously prior to January 1, 1977. Under President Carter's proposal, eligible aliens would, upon registering with the INS, be granted the temporary resident alien status for five years. After being granted this new status, an alien would be able to reside legally in the United States for a five-year period. 123 Cong. Rec. S13826 (President Carter) (August 4, 1977).

Petitioner in the instant case is clearly within the ambit of President Carter's proposal as he has been residing in the United States continuously since on or about August 27, 1975.

It should also be noted that the Immigration and Naturalization Service in Washington, D. C. has suspended deportation hearings in cases involving aliens within the aforesaid category pending Congressional decision on President Carter's proposal.

Therefore, petitioner has two separate grounds for remaining within the United States: (1) he is too ill to travel; (2) he is eligible to have his status adjusted to that of a temporary resident alien.

V. CONCLUSION

It is respectfully requested that the petitioner's order of deportation be vacated and that petitioner be granted a stay of deportation due to his illness, or in the alternative that the case be remanded for a full and fair hearing on the record, and, in addition, that the petitioner be granted the costs of bringing this petition.

Petitioner has demonstrated the gross statutory violations and deprivations of procedural due process rights by the respondent and as such is entitled to have the deportation order issued by respondent vacated. In addition, petitioner has shown that he is entitled to remain in the United States should the deportation order be vacated.

Petitioner has also demonstrated the clear abuse of discretion and unfair prejudice of respondent so as to make its denial of petitioner's request for a stay of deportation wrongful.

Finally, petitioner has shown that respondent's actions throughout this proceeding (e.g., failing to forward the record on appeal, attempting to deport petitioner before his deportation was scheduled, either not making or destroying a record of petitioner's alleged deportation hearing, frivolously opposing this petition when it is so clear that respondent blatantly violated petitioner's rights) have done nothing but delay a thorough and careful examination of the facts of this case and wasted the Court's and the petitioner's time. Thus, petitioner believes he is entitled to have costs awarded to him pursuant to F.R.App.P. 39 and 28 U.S.C. § 2412.

Dated: New York, New York
October 1, 1977

Respectfully submitted,

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Of Counsel:
David C. Buxbaum

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

OLGA QUAN, being duly sworn, deposes and says:

1. Deponent is not a party to the within action, is over 18 years of age, and resides at 27 East 37th Street, New York, New York 10016.

2. That on October 3, 1977, deponent served a true copy of the "Brief in Support of Petition to set aside Order of Deportation" upon Robert S. Fiske, Jr., Esq., United States Attorney for the Southern District of New York at One St. Andrew's Plaza Annex, New York, New York 10007, Attention: Robert S. Groban, Jr., Esq., by depositing same in a post-paid properly addressed wrapper in an official depository under the exclusive care of the United States Post Office in and for the City of New York, New York.

Olga Quan
OLGA QUAN

Sworn to before me this
3rd day of October, 1977.

Pamela M. Olsen

PAMELA M. OLSEN
NOTARY PUBLIC State of New York
No. 24-4[illegible]37
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 19[illegible]